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No. 87-1431

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LANZARO, Monmouth County Sheriff, *et al.*,
Petitioners,

v.

MONMOUTH COUNTY CORRECTIONAL INSTITUTION INMATES, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should render an advisory opinion on an issue that would have no effect on the Court of Appeals' unanimous, interlocutory decision?

2. Whether, under the Eighth Amendment, a county correctional facility can refuse to provide medical care necessary to effectuate an inmate's fundamental right to reproductive choice?

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COUNTERSTATEMENT OF FACTS

This case arises as part of an ongoing class action instituted by inmates[1] at the Monmouth County Correctional Institution (MCCI) against MCCI administrators and various county and state officials.[2] The inmates sought preliminary injunctive relief

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1. The inmates are represented by the New Jersey Department of the Public Advocate, a cabinet-level agency in the New Jersey state government.

2. The defendants/petitioners in these proceedings will be referred to as "the County" hereafter. The State defendants did not contest the relief sought related to inmates' reproductive rights, and so are not participants in the proceedings relevant to the petition for certiorari.

from the county defendants' policy which denied inmates all health care services related to the termination of pregnancy.[3] The relief was sought after Jane Doe,[4] a pregnant inmate who sought to terminate her pregnancy was denied medical services or assistance by the County pursuant to its policy of providing abortions only where a medical emergency presents a life-threatening situation to the mother.[5] In general, pregnant women who did not want to be forced to bear a child were required to

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3. There were two prior judgments in this case. The first, entered October 10, 1984, granted relief from overcrowding and directed other corrective measures related to exercise, health care, and other living conditions. MCCI Inmates v. Lanzaro, 595 F.Supp. 1417 (D.N.J. 1984). The second was a consent judgment entered on March 8, 1985, governing the provision of prenatal care to pregnant inmates, including treatment at an outside clinic.

4. Jane Doe is a pseudonym.

5. This has been the County's definition of a "medically necessary" abortion.

apply for a court order releasing them from jail so that they could attempt to secure the medical care necessary to terminate a pregnancy. Despite the fact that two physicians certified that Jane Doe's requested abortion could be characterized as "medically necessary," the County refused to provide her with any assistance in obtaining abortion-related services. During the pendency of the inmates' preliminary injunction application, a second inmate Mary Smith,[6] requested, and was denied, counseling and abortion services.

On May 29, 1986, the federal district court preliminarily enjcined the County from requiring women inmates to secure their own court-ordered release and provisions for medical care in order to obtain an abortion while in the County's custody. In its appeal of this order, the County "focused

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6. Mary Smith is also a pseudonym.

exclusively upon the District Court's interpretation of the Eighth Amendment insofar as it applies to elective, nontherapeutic abortions." Pet. App. 41 n.10 (quoting Brief of Appellant to the Third Circuit Court of Appeals at 7).

The three-judge panel of the Court of Appeals unanimously found that the preliminary injunction, as modified, was properly entered. The Court concluded, first, that the County's policy of requiring that pregnant inmates secure their own court-ordered release in order to obtain elective abortions impermissibly burdened their retained fundamental right of reproductive choice. The Court determined that, under Turner v. Safley, __ U.S. __, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the County's policy was irrational under each prong of the Turner "reasonableness" test, and that the accommodation of the right at issue would impose no additional burden on the use

of the jail's limited resources.[7] Pet. App. 85. The Court found that the determination of the specific means to accommodate the inmates' retained right was, however, a matter for the jail authorities. Pet. App. 85.

Second, with regard to the County's Eighth Amendment obligation to provide needed medical care for those in its custody, the Court of Appeals found that the County's policy also constituted deliberate indifference to the serious medical needs of pregnant MCCI inmates. Pet. App. 85. The Court noted that, at a minimum, the County had an affirmative duty to ensure that inmates were able to obtain medical care

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7. The County has never asserted that security concerns played any part in the formulation of the policy at issue. Pet. App. 49 n.15. Indeed, such an assertion would be difficult in light of the State Department of Corrections' policy of providing the medical care and services which the County's policy denied. See n.10, infra.

needed to effectuate their reproductive choice and that this access to medical care could not be first conditioned upon burdensome, time-consuming procedures or upon the inmates' prior guarantee of payment. Pet. App. 85-86. In concluding, the Court of Appeals left to the District Court the questions of whether either the Fourteenth or Eighth Amendments imposed an affirmative obligation on the County to expend public funds on the accommodation of inmates' retained fundamental rights or on the accommodation of inmates' serious medical needs.

REASONS FOR DENYING THE WRIT

I. THE JUDGMENT AFFIRMED BY THE CIRCUIT COURT OF APPEALS IS NOT FINAL AND CONSEQUENTLY CERTIORARI SHOULD BE DENIED

In its petition to this Court, the County seeks review of a limited aspect of the Court of Appeals' affirmance, with modifications, of a District Court's grant

of preliminary injunctive relief. The grant of a writ at this point in the case would conflict with the well-established principle that this Court's jurisdiction should be exercised sparingly and never, except in extraordinary cases, in the absence of a final decree. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258, 36 S.Ct. 269, 271, 60 L.Ed. 629 (1915). The lack of a final judgment[8] is a factor which alone may constitute a basis for denial of the writ. Id.; Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 942, 99 S.Ct. 335, 337, 58 L.Ed. 2d 335 (1978).

In this case, the Court of Appeals affirmed, with some modifications, the grant of preliminary relief after a review

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8. A final decision has been defined as "one that terminates the litigation on the merits and leaves nothing for the trial court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

"limited to determining whether there has been an abuse of discretion, an error of law, or a clear mistake in the consideration of the proof." Pet. App. 40; Moteles v. University of Pennsylvania, 730 F.2d 913, 918 (3rd Cir. 1984), cert. denied, 469 U.S. 855, 105 S.Ct. 179, 83 L.Ed. 2d 114 (1984). In doing so, the Court of Appeals specifically stated that "[t]he issue whether such accommodation requires the expenditure of public funds is not ripe or resolvable on this appeal," Pet. App. 85, and left this question and that of whether the Eighth Amendment imposed an affirmative, separate financial obligation on the County to the District Court. Id. Thus the issue brought to this Court for review has yet to be finally resolved by either the District Court or the Third Circuit Court of Appeals. Even if the limited issue which petititoner raises here merited review by certiorari, it

is not yet ripe for this Court's consideration.

II. CERTIORARI SHOULD BE DENIED BECAUSE ISSUANCE OF AN ADVISORY OPINION ON THE ISSUE FOR WHICH PETITIONER SEEKS REVIEW WILL HAVE NO EFFECT ON THE OUTCOME OF THE CASE BEFORE THE COURT

The Third Circuit Court of Appeals enunciated two distinct legal bases for its affirmance of the district court's grant of preliminary relief: 1) plaintiffs' Fourteenth Amendment right to reproductive choice, recognized in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), and its progeny and evaluated in the jail and prison context under the "reasonableness" test of Turner v. Safley, __ U.S. __, 107 S.Ct. 2254, 96 L.Ed. 2d 64 (1987); and 2) the County's affirmative obligation, created by the Eighth Amendment, to provide for inmate's serious medical needs under Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976). Petitioner seeks review of only the second basis of the

Court of Appeals' decision. Brief of Petititoner at 2 n.1, 3-6. Because this Court's review of the limited issue which petitioner challenges would leave entirely undisturbed the result affirmed below, certiorari should not be granted.

With the exception of jurisdictional defects below, this Court normally limits its review to those issues contained in the questions presented by the petitioner. Sup. Ct. Rule 21.1(a); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398, 99 S.Ct. 1171, 1175, 59 L.Ed. 2d 401 (1979); City of Springfield, Mass. v. Kibbe, ____ U.S. ____, 107 S.Ct. 1114, 1116, 94 L.Ed. 2d. 293 (1987). This Court has in fact emphasized that only in the most exceptional cases will it consider issues not raised in the petition for a writ of certiorari. E.g., Stone v. Powell, 428 U.S. 465, 481 n.15, 96 S.Ct. 3037, 3046 n. 15, 49 L.Ed.2d 1067 (1976); Kaufman v. U.S., 394

U.S. 217, 239 n.7, 89 S.Ct. 1068, 1080 n.7, 22 L.Ed.2d 227 (1969) (Black, J., dissenting); see also U.S. v. Stewart, 650 F.2d 178, 180 (9th Cir. 1981). There are no exceptional circumstances which would warrant this Court's review of the Fourteenth Amendment ground which supports the judgment below and which petitioner has never questioned. See Pet App. 41 n.10; see also Letter Brief of Malcolm V. Carton, Esq. to Honorable Harold A. Ackerman at 2 (April 25, 1986), (reprinted in App. To Appellants' Brief to the Third Circuit at A25).

The ground for the decision which the petitioner has not presented for this Court's review fully supports the judgment below. In light of this, any review of the alternative basis for the Circuit Court's judgment would effectively be advisory in nature. The Supreme Court has made repeated pronouncements on the rule against rendering advisory opinions, e.g., Herb v. Pitcairn,

324 U.S. 117, 126, 65 S.Ct. 459, 496, 89 L.Ed. 789 (1945); City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 294-95, 297, 102 S.Ct. 1070, 1077, 1079, 71 L.Ed.2d 152 (1982). Accordingly, the Court should decline exercise of its discretionary jurisdiction to pass on an aspect of a case that would not affect the ultimate outcome and is thus essentially academic. The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183-84, 79 S.Ct. 710, 713, 3 L.Ed. 2d 723 (1959).

The Court of Appeals' Fourteenth Amendment analysis under Turner v. Safley, supra, provided not only a separate and independent basis for the judgment, but the primary and unanimous basis as well. The Court's detailed analysis of the County's obligation to accommodate inmates' fundamental right to procreative choice considered in total the County's blanket policy of refusing inmates any assistance in

securing an elective abortion. See, e.g., Pet. App. 53, and generally at 42-69. The Court concluded that, on the facts of this appeal, "under the reasonableness standard articulated in Turner and applied in Estate of Shabazz, the County's regulation is invalid." Pet. App. 49. While cautioning, as it did under its Eighth Amendment analysis, that its recognition of an inmate's right to accommodation need not impose on the County an affirmative obligation to appropriate funds for this purpose, Pet. App. 67-68, the Third Circuit concluded "[t]hat adequate means to accommodate the inmates' meaningful exercise of their right must be provided..." Pet. App. 68. The Court then supplemented this holding with an examination of the County's policy under the Eighth Amendment. Pet. App. 69-84.

The Third Circuit panel was unanimous in affirming the district court's grant of

preliminary relief. In a concurring opinion, Judge Mansmann "join[ed] the majority in holding that the plaintiffs are likely to succeed on their claim under the Fourteenth Amendment" but simply "stop[ped] short" of the majority's conclusion that the Eighth Amendment "is also implicated..." Id. at 352-53. Despite the language of the concurrence on which petitioner relies, Judge Mansmann takes no issue with the result -- the affirmance of the district court's grant of preliminary relief. The Supreme Court should not grant certiorari to review an issue in a case in which the Court of Appeals unanimously affirmed, on a distinct and independent ground, a preliminary determination by the district court.

III. THE CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE STANDARDS SET FORTH IN ESTELLE V. GAMBLE, 429 U.S. 97 (1976) AND ITS PROGENY IN FORGING THE EIGHTH AMENDMENT BASIS OF ITS DECISION

Even if the judgment below were final and unsupported by an independent basis not at issue here, this Court should deny certiorari. The Court of Appeals faithfully applied the standard applicable to prisoner medical care claims which this Court and other federal courts have carved out. The petitioners' objections are not based on the actual standard employed but on their subjective perception of the importance of inmates' ability to choose to end a pregnancy.

In its brief to the Court of Appeals, the County likened its responsibility to assist inmates requesting nontherapeutic abortions to its responsibility to "an inmate who desires a facelift or the removal of varicose veins for purely cosmetic reasons..." Pet. App. 34. The County also asserted that an inmate must suffer from "an

abnormal medical condition" in order to come within the scope of jail officials' obligations to provide medical care to their wards. Pet. App. 78.[9] In its analysis rooted in Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) and subsequent federal cases employing its principles, the Court of Appeals properly concluded that the County "misperceive[d] both the nature of the underlying need and the anticipated harm required to meet the Estelle standard." Pet. App. 78.

The Court of Appeals examined the County's policy in light of Estelle and subsequent federal court decisions

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9. The Court of Appeals noted:

> Under the County's view, medical care associated with full term pregnancy would not constitute a "serious medical need" under Estelle, "pregnancy, in and of itself, not being an 'abnormal medical medical condition.'" Pet. App. 78 n.34 (quoting Brief of Appellants at 14).

delineating the types of circumstances, in terms of the medical care requested and the harm produced by its denial, which evidence "deliberate indifference to serious medical needs." See generally Pet. App. 72-84. The Court also considered federal court precedent which addressed the concomitant financial responsibility for ensuring that the requirements of the Eighth Amendment are satisfied. See Pet. App. 82-84. The Court of Appeals concluded "that the inmates have carried their burden of establishing that the categorical denial of elective, nontherapeutic abortions constitutes deliberate indifference to serious medical needs under both prongs of Estelle," Pet. App. 81, and that the County is responsible for insuring that necessary means are available to meet the medical needs of inmates exercising their reproductive choice. Pet. App. 84. However, the Court did not translate this responsibility into

an affirmative obligation to appropriate public funds for this purpose. Pet. App. 84.

Clearly, this case does not provide the compelling basis for a grant of certiorari that this Court found in its recent "prisoners rights" cases of last term: Turner v. Safley, __ U.S. ____, 107 S.Ct. 2254, 96 L.Ed. 2d 64 (1987) and O'Lone v. Estate of Shabazz, ____ U.S. ____, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987). In both Turner and Shabazz, the focus of the dispute was the choice of the actual legal standard to be employed in evaluating prison regulations which impinge on inmates' constitutional rights. See Turner, supra, 107 S.Ct. at 2258-2261 (lower courts had employed a "strict scrutiny" standard of review); Shabazz, supra at 2402, 2404-05 (invalidating use of stricter standard when regulation effectively prohibited, rather than limited, exercise of a right). In both

cases, the judgment below hinged on the particular standard selected. In this case, petitioner does not challenge the choice of standards, nor is there any conflict whatsoever among the Circuit Courts of Appeals concerning the appropriate standard for evaluating prisoners' medical care claims under the Eighth Amendment.

In reaching its conclusion on pregnant inmates' rights to needed medical care under the Eighth Amendment, the Court of Appeals identified several important principles already enunciated by this and other federal courts. Starting with Estelle, the Court of Appeals noted the reasoning behind the two-pronged Estelle standard, which requires a showing of "deliberate indifference to serious medical needs of prisoners." Pet. App. 73. This reasoning, the Court pointed out, recognizes that "[a]n inmate must rely on prison authorities to treat his [or her] medical needs [, and that] if the

authorities fail to do so, those needs will not be met." Pet. App. at 73, citing Estelle, supra, 429 U.S. at 103, 97 S.Ct. at 290. Citing to Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976) (cited with approval in Estelle, 429 U.S. at 105 n.11, 97 S.Ct. at 291 n.11), the Court of Appeals stated that "[w]here prison authorities deny reasonable requests for medical treatment ... and such denial exposes the inmate to undue suffering or the threat of tangible residual injury, deliberate indifference is manifest." Pet. App. 74. The Court of Appeals also determined that other federal courts had found "deliberate indifference" when medical treatment is delayed for non-medical reasons, Ancata v. Prison Health Services, 769 F.2d 700, 704 (11th Cir. 1985); accord Archer v. Dutcher, 733 F.2d 14 (2nd Cir. 1984), when prison officials erect arbitrary and burdensome procedures that result "in interminable delays and outright

denials of medical care," Todaro v. Ward, 565 F.2d 48, 53 (2nd Cir. 1977), or when they condition provision of needed medical services on the inmates' ability or willingness to pay. See Ancata, supra, 769 F.2d at 704; cf. City of Revere, 463 U.S. 239, 245, 103 S.Ct. 2979, 2983, 77 L.Ed. 2d 605 (1983) (right to medical treatment constitutionally mandated regardless of who pays); Pet. App. 73-74.

The Court of Appeals appropriately reasoned that the seriousness of an inmate's medical need, in satisfaction of the second prong of the Estelle test, can be determined by reference to the effect of denying the requested treatment. Pet. App. 75-76. Estelle viewed pain and suffering produced by the denial of medical care as patently unrelated to any penological purpose, 429 U.S. at 103, 97 S.Ct. at 290; Roe v. Wade addressed the effect of the denial of

which the County's policy left unanswered are serious.

In Estelle, this Court recognized inmates' total dependence on prison officials for medical care, 429 U.S. at 103, 97 S.Ct. at 290, and consequently concluded that "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." Id. at 104, 97 S.Ct. at 291. Acknowledging this principle, the Court of Appeals concluded that while jail officials may not have an affirmative financial obligation under the Constitution to expend public funds for medical care, they may not condition the provision of needed medical services, including those indispensable to reproductive choice, upon a guarantee of payment by the inmate. Pet. App. 82-84. See City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244-245, 103 S.Ct. 2979, 2983-84, 77 L.Ed. 2d

605 (1983) (governmental entity must ensure that needed medical care is provided; while Constitution doesn't dictate allocation of costs, entity must pay when payment is necessary to secure needed care); see also Ancata, supra, 769 F.2d at 705 ("The County is responsible for insuring that adequate funds are provided to meet the medical needs of inmates."). Accordingly, the ruling of the Third Circuit simply does not, as the petitioner suggests, lead to the result of allowing persons who could not obtain an abortion obtain one by virtue of their confinement to a jail. Pet. Brief 5. To the contrary, the Third Circuit merely affirmed the District Court's preliminary conclusion that pregnant women forced to depend on jail officials for their medical care should not suffer forced childbirth

solely because they are incarcerated.[10]

In short, there is no conflict between the Court of Appeals' conclusions on the Eighth Amendment basis of its judgment and opinions of the Supreme Court and other federal courts which have construed inmates' right to needed medical care under the Eighth Amendment. Indeed, petitioner cites to no case which would require a different result. Particularly because the Third Circuit carefully adhered to the principles enunciated by the Supreme Court and other federal courts in limiting the scope of its holding on this issue, this Court should

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10. It is noteworthy that the New Jersey Department of Corrections, a defendant in other proceedings related to this case (and the prevailing party before this Court in Shabazz), has not joined the petitioner in its challenge here. In fact, the New Jersey Department of Corrections has adopted detailed regulations which guarantee pregnant state inmates' access to all needed medical care and services regardless of the inmate's reproductive choice. New Jersey Administrative Code 10A:16-6.1 et seq..

deny *certiorari* to review petitioner's contention that forced childbirth through incarceration is countenanced by the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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